

Greyston Bakery, Inc. and Local 3, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO. Cases 2-CA-29671, 2-CA-30407, and 2-CA-30831

January 25, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On October 2, 1998, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greyston Bakery, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Karen M. Newman, Esq. and *Joshua Zuckerberg, Esq.*, for the General Counsel.

Alfred J. Smith, Jr., Esq., of Stamford, Connecticut, for the Respondent.

Samantha Dulaney, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in New York, New York, on 6 days be-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent demonstrated union animus, we find that the Respondent's conduct in violation of Sec. 8(a)(1) amply demonstrated such animus. We therefore find it unnecessary to rely on any conduct by the Respondent other than that found to have violated Sec. 8(a)(1).

² In Member Hurtgen's view, the judge, in several instances, engaged in improper speculation. For example, the judge stated that, because employee James Edmonson had been orally warned about attendance problems, "it is reasonable to assume that the same is true for other employees." There is no finding to support that statement. Nor does Member Hurtgen agree with the judge's implicit rejection of the argument that an employer could reasonably choose a person for layoff because that person will likely find another job. Despite these instances, however, Member Hurtgen finds sufficient record evidence to support the 8(a)(1) violations found. Further, he concludes that these 8(a)(1) violations supply the requisite "animus" needed to support the 8(a)(3) findings.

tween September 23, 1997, and January 14, 1998. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (3) of the Act, interrogated its employees, threatened its employees with loss of benefits and with discharge because they formed the Union, placed an employee on a production quota, committed various other violations, suspended employees, and discharged employees James Edmonson, Irene Williams, Berlin Craig, and Sabrina James. Respondent denies that it engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on March 20, 1998, I make the following²

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Yonkers, New York, is engaged in the wholesale production of baked goods. Respondent annually purchases and receives at its Yonkers, New York facility goods and supplies valued in excess of \$50,000 directly from points located outside the State of New York. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 3, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO (the Union), is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Greyston Bakery (the Bakery) is associated with the Greyston Foundation and the Zen Community of New York. The mission of the Foundation is to work with the residents of southwest Yonkers, New York, to help people who are homeless, incarcerated, formerly addicted, and disenfranchised to achieve self-sufficiency. The Foundation provides housing, day care, a residence for AIDS sufferers, and a day health facility. The Greyston Bakery offers economic opportunity for people who have little or no experience in the job market. Frederic McCabe, until November 1997, the CEO of the Bakery, stated that the mission of the Bakery was to work with the employees so that they could "empower" themselves.

The Greyston Bakery is divided into two production departments: the cake and tart department makes products for the New York City restaurant market, and the brownie department make brownies for Ben & Jerry's Ice Cream in Vermont. The brownie department provides about 75 to 80 percent of the bakery's revenue. The brownies are used by Ben & Jerry's in the manufacture of ice cream and frozen yogurt. The evidence shows that an employee, called a mixer, measures the ingredients for the brownies and mixes them into a batter. The mixture is deposited into baking pans and baked. Later, the brownies are broken up on a cutting table, and pieces of brownie which are not acceptable are removed and discarded. Finally, the brownies are boxed and frozen for shipment.

The Union began organizing the employees of the Bakery in July 1996. On August 19, 1996, the Union filed its petition for

² The record is corrected so that at p. 9, L. 8, it reads, "these stipulations comport with his understanding"; at p. 13, LL. 11 and 14, the phrase should read, "disparate treatment."

certification in a unit comprised of production and maintenance employees. An election was held on October 2, 1996. The tally of ballots showed that of approximately 29 eligible voters, 13 votes were cast for the Union and 12 votes were cast against the Union. One challenged ballot was determinative.³ On March 31, 1997, the Union was certified to represent the unit. Respondent is testing the certification.

Respondent provides its employees with a handbook which states in pertinent part:

Introduction

The following document is meant to provide you with an understanding of . . . certain terms of employment. . . . Please keep in mind that this handbook is not a statement of a contract between Greyston Bakery and you as the Employee, nor is it all-inclusive. As the Bakery grows and changes, the policies in this handbook will grow and change. . . .

Attendance

. . . The following actions will be taken as a result of poor attendance behavior:

1. Three unexcused latenesses during a thirty-day period will result in a one-day suspension.
2. Three more unexcused latenesses (starting from date of previous suspension) in a thirty-day period will result in a three day suspension.
3. Three more unexcused latenesses in the next thirty-day period (start from date of previous suspension) will result in immediate termination.
4. Absences will follow the same procedure. One unexcused absence per thirty-day period will be subject to the same penalties as stated above.

Absence is sometimes unavoidable, but communicating that you are going to be absent is absolutely necessary. Even if you have a legitimate reason for your absence, if a pattern of absences develops, we will have no other choice but to take disciplinary action, including termination. . . .

Rules of Conduct

. . . What follows are examples of unacceptable conduct . . . which may result in disciplinary action . . . including discharge. Depending upon the circumstance, serious, aggravated or repeated incidents may result in written warning, suspension, or discharge without prior discipline.

1. Tardiness and excessive absenteeism.
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6. Failure to follow job instructions.
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8. Insubordination.

Some conduct is . . . so serious that it will usually result in immediate discharge, though management reserves the right to enforce appropriate alternative disciplinary measures, depending upon the circumstance. Examples of such misconduct are:

1. Threatening or striking another Employee.

³ The challenged ballot was that of James Edmonson who had been discharged in August. His ballot was opened and counted, resulting in a union victory by 14 to 12 votes.

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11. Indecent or offensive language or conduct on Bakery property.

Involuntary Termination (Lay-Off)

. . . Greyston Bakery will take into account overall quality of performance, dependability, skills, attendance record, length of service, production requirements, and department needs, in determining which employee to lay-off.

2. Respondent's reaction to the Union

McCabe testified that he first learned of the Union's organizing efforts on Wednesday, August 21, when he received notice that the petition had been filed. McCabe met with his managers and supervisors on Monday, August 26, 1996, and notified them of the Union's organizing efforts. According to McCabe he instructed the supervisors not to question employees and not to initiate conversations with them about the Union.

McCabe held two meetings on August 26 or 27 with the unit employees. He announced that a union petition had been filed. About 1 week later, he conducted another meeting with unit employees where he tried to give the facts about the Union and what would happen if there were an election. McCabe stated that he let the employees know that he preferred dealing with them directly instead of through a third party. He described the union agents as outsiders; his supervisors heard him make such comments.

McCabe testified that he had no opinion one way or another concerning the desirability of the Union coming to represent the employees at the bakery. He just wanted a fair election to be held. McCabe stated that he was not attempting to convince the employees that they did not actually need the Union. Indeed, he did not tell them whether he wanted the Union or not. McCabe acknowledged that although the Union had been certified at the time of the instant hearing and although a majority of the employees voted to have the Union represent them, Respondent has refused to bargain and is testing the certification.

The record shows that McCabe sent a letter to employees dated August 27, 1998, which stated in part:

The more you know about unions in general and this union in particular, I think that you will agree we do not need a stranger involved. [Emphasis in original.] You have defined some very interesting ideas about how we can communicate better with each other, and I would like to see how we can put those ideas to work without a third party in between us.

The letter went on to provide the employees with McCabe's telephone numbers at work, at home and by pager and invited the employees to "feel free to call me at any time."

On September 9, McCabe sent a letter to all of the employees informing them that the election would be held on October 2. The letter said:

As you know, we feel that it is not necessary for you to bring in an outsider, pay dues and be subject to fines, assessments and penalties. Sure, I will be the first to admit that there have been some problems at the bakery—what organization doesn't have them? However, we feel it would be better for all of us to continue to try to solve our problems together as we have in the past—without the intervention of a stranger.

On September 11, 1996, McCabe addressed a letter to the employees informing them of the Union's right, under its by-

laws, to impose fines and dues. The letter said that “serious burdens and risks” would be placed upon the employees “should you vote for the Union.”⁴

On September 17, 1996, McCabe sent the employees a letter explaining that the bakery was required to furnish the names and home addresses of employees to the Union prior to the election. The letter said, “[W]e are not happy about this. (Emphasis in original.) The letter stated that employees did not have to let union organizers, whom it referred to repeatedly as “these outsiders,” into their homes.

On September 18, 1996, McCabe sent a letter which informed employees that the Union had sent an “outrageous” letter asking McCabe to cancel the election and “*DEPRIVE YOU OF YOUR RIGHT TO VOTE.*” (Emphasis in original.) The letter went on to say that “this is typical of what happens when you get involved with outsiders who desperately need YOUR DUES AND FINES to pay for big salaries and conventions at fancy resorts.” (Emphasis in original.) The letter ends by urging the employees, “Let’s send these paid organizers a message that you will not be treated this way and vote NO on October 2.”

On October 1, 1996, the day before the election, McCabe sent another letter to the employees, referring to two meetings he had conducted on September 30 and October 1, and stating, “If we can all talk together like *that without some outside strangers*, we can make real progress.” (Emphasis in original.)

Other managers and supervisors discussed the Union with the unit employees.

General Manager Julius Walls testified that if employees came to him with questions about the Union, he told them that he believed that the Union was not needed. However, he did not threaten employees and did not discourage employees from joining the Union. Walls denied telling employees that he did not want the Union.

Production Coordinator and Team Captain Edward Lewis testified that he is loyal to the bakery because it gave him a chance to make something of himself. Lewis stated that he was not happy when he heard that the Union was organizing the employees. He viewed the Union as an outsider which would hamper the bakery in its ability to help the community. On May 10, 1997, Lewis addressed the employees about the positive aspects of the bakery. He discussed his own career at the bakery and mentioned the benefits and the incentive plan. There were some new employees and he wanted them to judge the bakery for themselves and give it a fair chance. Lewis stated that there was a lot of negativity going around. However, he said that he did not hear anyone talk negatively about the bakery but that he had received “vibes” to that effect. Lewis said that he discussed the Union with Maintenance Supervisor Jerome Lee.

Maintenance Supervisor Jerome Lee testified that he did not care whether or not the Union came to the bakery. Lee stated that he discussed the Union with Quality Assurance Supervisor Gary Nash who told him that he had no idea why the employees would want a Union. Lee also discussed the Union with Lewis and they speculated about how the organizing got started. Lee testified that those employees who spoke negatively about the bakery, saying that it did nothing for them,

were the people who wanted the Union. Lee heard Lewis talk to the employees on May 10, 1997. Lewis mentioned the good things about the Bakery and said that the Bakery had helped people, giving them jobs and bending over backwards for employees.

Night Supervisor Steven Bodden testified that he had no opinion about the Union. Bodden claimed that he never discussed the Union with other supervisors and that he never mentioned the Union to any unit employees. Bodden never heard McCabe use the term “outsider” about the Union.

Supervisor Gary Nash is in charge of quality assurance and community relations. Nash, who has worked at the bakery for 8 years, testified that he learned of the organizing activity at the Respondent on August 26 when McCabe informed supervisors that a petition had been filed. McCabe told the supervisors not to cause conflict with the employees over the Union no matter what their personal opinions might be. McCabe enunciated “do’s and don’ts”, including a rule that supervisors should not give their personal views about the Union. Nash testified that after August 26 he had many conversations about the Union with supervisors and employees, and that he discussed the pros and cons of the Union with employees. Nash thought the Union was for the people, and that was good. However, in his view, the Union was a bit deceptive in promoting itself. Nash heard that the Union told employees that all of them would get a raise if the Union won the election and he did not think it was fair to make that statement. Nash denied that he threatened bakery employees with a loss of benefits if they supported the Union and he denied giving employees the impression that their union activities were under surveillance.

3. Discharge of James Edmonson

James Edmonson worked at the Bakery from July 1994 to August 1996. Edmonson began as a quality control employee. After a few months he became a mixer. His job consisted of measuring and mixing the ingredients used to make brownies for Ben & Jerry’s. A number of Respondent’s witnesses testified that Edmonson was the “head mixer” but no such term appears on any personnel documents and Edmonson denied that he was ever told that he was the head mixer.

Edmonson testified that he had trained other employees to mix brownies, including Jamel Kerson, Thomas Berry, Legrand Martin, Danny Andino, and an employee named Andrew. According to Edmonson, there are two mixers on a shift. On his 8 p.m. to 6 a.m. shift, Jeffrey Addison was the other mixer. When one mixer is not at work, the other mixer covers for him.

Edmonson testified that in July 1996, the employees discussed the need for a union at the Bakery. Beginning in mid-July 1996, he distributed authorization cards for Local 3 on the Bakery’s production floor, in the locker room, outside the facility and in the homes of individual employees. Edmonson gave other employees information about the Union and he helped to schedule meetings where the Local 3 organizer spoke to interested employees.

Edmonson testified that on August 16, 1996, he was on a break at 10:30 or 11 p.m. Edmonson went to a store up the hill from the Bakery to buy a sandwich and he sat in front of the store eating his sandwich with Supervisor Jerome Lee. Lee asked Edmonson if he was trying to start a union in the Bakery. Edmonson replied that he did not know who started it but that he had signed a card. Lee told Edmonson that Supervisors Gary Nash and Edward Lewis were trying to find out who

⁴ McCabe did not tell the employees that they could be represented by the Union without becoming members and that they could avoid being subject to fines and penalties.

started the Union. Edmonson said that he had signed and he asked if there was anything wrong with signing. Lee responded that if he were not part of management he would sign up too. The men then discussed examples of the poor treatment of employees by the Bakery. An employee named Chase who was there said that a union would hurt everybody, but Edmonson said they just needed better working conditions. On cross-examination, Edmonson testified that he was sure of the date when this incident occurred because it was the day after payday. When it was pointed out to Edmonson that payday is a Tuesday, but that August 16, 1996, was a Friday, Edmonson stated that he might be wrong about the date.

On August 19, according to Edmonson, he noticed that contrary to the usual situation, the supervisors were watching every step the workers made. On August 21, employees Dawn James and Irene Williams informed Edmonson that Supervisors Nash and Lewis had asked them if they had signed union cards.

Edmonson testified that he arrived at work 4 hours' late on August 21. His uncle had died and he was very disturbed. Edmonson had not called in to say he would be late because his telephone service permitted him to receive calls but not to place calls.⁵ According to Edmonson, he explained the circumstances to Lewis who excused his lateness and did not impose discipline or a written warning. On August 22, Edmonson did not report to work at all. Edmonson stated that his wife left for work at 5 p.m. Usually, Edmonson takes a nap and wakes up at 7 p.m. so that he can drop off the children at his mother's house and then get to work by 8 p.m. On August 22, however, Edmonson overslept and did not wake up until midnight. He could not telephone the Bakery because that would have required taking the children 15 blocks to the nearest pay phone. On August 23, Edmonson arrived at work 25 minutes before his shift began and he saw Lewis who asked him what had happened the day before. Edmonson told Lewis that he had overslept and that the telephone had been turned off. Lewis said that he could not let Edmonson work. Edmonson replied that it was understandable because of the Employer's policy, and he said that he hoped he would not lose his job over the incident. Lewis requested that Edmonson call him on Monday, August 26. On Monday, when Edmonson spoke to Lewis, the latter said that Respondent had reviewed his folder and had decided to discharge him. Edmonson asked why he could not be given probation instead. He did not want to lose his job. But Lewis said that probation was not an option.

On August 31, Edmonson went to the Bakery to say hello to his friends. He saw Bodden who told him that management had not spoken to him about what had happened. Then Bodden told Edmonson that Respondent had received a letter from the Union. Edmonson testified that Bodden told him that the Bakery was starting to fire people such as Irene and Teresa.

Edmonson testified that he had been warned for lateness in the past, but that he had never been warned that he might lose his job because of attendance problems. On February 10, 1996, Edmonson received a written employee warning notice for tardiness: the form stated that if such an incident occurred again he would receive another warning. On May 31, 1996, Edmonson again received a written warning for tardiness with the notation that if he were late again he would receive another written warning. On June 4, Edmonson was 30 minutes late

and received a written warning which stated that this was his second warning slip within a 30-day period and that if the incident occurred again he would receive a written notice and a 1-day suspension. On June 11, he did not come to work at all and he was deemed a "no show" because he had not given prior notice of his absence. He was given a written notice and a 1-day suspension.

On cross-examination, Edmonson recalled that on the occasion that he was late because of his uncle's death, Lewis and Bodden spoke to him about his failure to come in on time. Edmonson testified that Lewis said he would be excused for coming in late, and then Lewis said, "I'm trying to help you keep your job." According to Edmonson, he replied that he had not been told that his job was in jeopardy, and Lewis said it was not. Edmonson erroneously gave the date as August 13. The record shows that on August 21, Bodden signed a notice that Edmonson had come to work 1-1/2 hours late without notifying Respondent in advance. Bodden wrote that Edmonson was given a verbal warning and that the absence was considered unexcused. On August 22, Bodden signed an absence report that Edmonson had not come to work and had not called to notify Respondent in advance. The report states, "This is a repeat incident. First incident date June 11, 1996, when he was given a warning and suspended. James Edmonson will be terminated for this unexcused absence. This is unacceptable conduct." Edmonson was discharged effective August 23, 1996, by a notice sent to him stating that the reason for the discharge was "Failure to give prompt notice of absence to Team Captain. This is unacceptable conduct; this is a repeat offense."

Lewis was Edmonson's supervisor.⁶ Lewis testified that on August 21, 1996, Edmonson was 1-1/2 hours late to work and on August 22 he did not report to work and he failed to call the bakery to say that he would be absent. According to Lewis, Edmonson had chronic lateness and absenteeism problems: he was late on the average of two or three times a week and he was absent on other occasions. Many of Edmonson's latenesses were not written up because it is the Bakery's policy to use verbal warnings to try to help employees improve their performance. However, Lewis informed McCabe of Edmonson's problems when they first began. Lewis spoke to Edmonson numerous times and gave him verbal warnings about his attendance. Lewis told Edmonson that he was risking his job. Lewis said that he switched Edmonson's schedule four times in an effort to enable him to report to work on time. Lewis stated that Edmonson was told that he was the head mixer and that he had to be at work on time so that he could produce for the rest of the shift. If Edmonson was late, it affected production. Lewis denied that Edmonson had told him about an uncle's death and had been excused for being late on that occasion: Lewis did not reassure Edmonson that his job was not in jeopardy. On August 22, Lewis spoke to Bodden and to McCabe about Edmonson's failure to come to work. Lewis recommended to McCabe that Edmonson be fired, and McCabe agreed. McCabe instructed Lewis that Edmonson should be informed of his discharge on Monday, August 26. On that day, Edmonson called Lewis early to ask what decision had been made concerning him. Lewis did not want to inform Edmonson that he was fired over the telephone and he asked Edmonson to come to the bakery. But Edmonson could not come in and so

⁵ Edmonson was aware that he had to telephone at least 2 hours before the start of his shift if he was going to be late to work.

⁶ Lewis was often called "Kato" by employees and supervisors at the bakery.

he was told about his discharge over the telephone. Lewis testified that when he made the recommendation to McCabe concerning Edmonson he did not know of any union activity going on at the Bakery; he stated that he had never seen Edmonson distributing union authorization cards to other employees.

Lewis recalled that on August 26, McCabe held a meeting with the supervisors and told them the Union was organizing. Lewis denied that he treated employees differently after August 19 and he denied watching them more closely. He denied that he asked any employees whether they had signed cards for the Union.

Supervisor Jerome Lee denied that he ever asked Edmonson whether he was trying to start a union at the Bakery. Lee said that he did not tell Edmonson that Lewis and Nash were trying to find out who started the Union.

Supervisor Gary Nash testified that he had warned Edmonson on occasion for being late to work and that he had written him up a few times. He did not see Edmonson distribute union cards and he was not aware of any union activity by Edmonson at the time of his discharge. Nash denied asking employees if they had signed authorization cards.

Supervisor Steven Bodden recalled that Edmonson had a problem with lateness and absenteeism; Bodden did not usually write Edmonson up for these problems; instead, he tried to talk to him about his problems. Bodden had warned Edmonson that he might lose his job because of his attendance problems. On August 23, 1996, Bodden and Lewis spoke to McCabe to tell him that Edmonson had been a no-show no-call; they recommended that Edmonson be fired. McCabe said that it should be handled on Monday, face-to-face. Bodden was not aware of any union activity at the Bakery on this date. Bodden testified that he did not tell Edmonson that he was fired because "it was messed up" and he did not tell Edmonson about a letter from the Union. Bodden stated that he never spoke to Edmonson about the Union.

McCabe testified that he decided to discharge Edmonson on August 23 because of his pattern of absence and lateness. Two incidents led directly to this decision: Edmonson was late on August 21 and then he did not come in and did not call at all on August 22. On August 23, McCabe while speaking to Lewis and Bodden by telephone; McCabe made his decision based on the two incidents and an extensive record of lateness and absences. When McCabe decided to fire Edmonson, he was unaware that Edmonson had engaged in any union activity. McCabe stated that he had never heard of anyone giving out cards for the Union and no supervisors had informed him of any union activity. McCabe explained that he is not at the Bakery 5 days a week, but that he keeps in touch by telephone and is available to the supervisors by beeper.

The record shows that other employees received written warning notices for attendance problems:

Employee Jeffrey Addison, a mixer on the brownie crew, received a number of written warning notices beginning on June 13, 1995. On June 28 he was suspended for failing to report to work on the previous day. On September 7, 1995, he was written up for being a no-show no-call on the previous day, and he was given a 2-day suspension and warned that he would be dismissed if the incident occurred again. He was warned for lateness on March 6 and April 10, 1996. On June 26, he was warned for being late on August 24 and 25 and informed that another such incident would result in his dismissal. Addison resigned on August 1, 1996. McCabe testified that manage-

ment of the Bakery was trying to help Addison with an alcohol problem and that this factor affected the way the Bakery dealt with Addison's tardiness.

Employee Jamel Kerson of the Ben & Jerry's crew received three written warnings for being from 10 to 15 minutes late in reporting to work on April 20, August 5, and September 27, 1995. On June 4 and 7, 1996, Kerson was 15 minutes late and he was warned that a third incident would lead to a 1-day suspension. Kerson was 4 minutes late on October 22, and he was 3 hours late on October 30 due to Halloween shopping and 30 minutes late on November 11, 1996. On this last date, he received a 1-day suspension for a "third warning."

Employee Jonathan Dixon worked on the Ben & Jerry's crew; he was learning to be a mixer. Dixon was late on August 1, he was absent on August 4 and he was suspended for failing to follow a supervisor's instructions on August 16, 1995. Dixon called the bakery on August 25 to say he would be late because he was taking his daughter to the doctor, but he did not come to work at all. He was given a 3-day suspension on August 28, and he resigned on September 1, 1995.

According to McCabe, the handbook attendance rules are not applied to employees in a literal manner; management takes extenuating circumstances into consideration in meting out discipline. The handbook is used as a guideline and its provisions are not a contract with the employees. This flexibility explains why the Bakery's employees with attendance problems are dealt with in different ways.

4. Layoff of Irene Williams

Irene Williams was hired by Respondent at the end of May 1996. Williams worked on the brownie crew from 10 a.m. to 6 p.m., but with overtime, she often worked 50 to 60 hours per week. Williams stated that she was told that her probationary period would last 90 days. Williams was evaluated every 2 weeks during her probationary period by Steve Bodden; her scores show a rising level of performance in every category on the evaluation sheet.⁷ Under the section marked "Attitude," Williams received the highest and the next to highest scores in all seven categories. Williams testified that on August 16, 1996, Bodden told her that if she stopped fussing and fighting with a certain employee, she would have a permanent position after 90 days. Williams received no indications from management that she had a poor attitude.

Williams testified that in late July or early August 1996, she signed a union authorization card at the behest of fellow employee Dawn James. She and James talked about keeping their union activity secret. Williams discussed union meetings with other employees and she asked them to sign authorization cards.

Williams testified that she had a social dating relationship with Supervisor Gary Nash. On August 10, according to Williams, Nash called her an "agent" and said that was "a game they were playing on the job." On August 24, Williams went to attend a union meeting in Yonkers and she waited 2 hours for the union representative to appear. During a later telephone call, she argued with Nash about the Union: Williams asked

⁷ The evaluation sheet used a rating system where "5" was the highest score and "1" was the lowest. For the 19 qualities rated on the sheet, Williams received the highest rating in 7 instances, she received the second highest rating in 11 instances, and she received a rating of "3" in one instance having to do with understanding and applying the safety and sanitation rules.

what was the matter with a union and Nash responded that the Union would come in and mess things up. Williams said the Union would protect workers from the supervisors. Nash accused her of lying about going to the union meeting and told her that the Union was not so great. Williams hung up the phone in response to his comments.

On August 26, McCabe held an employee meeting on the Bakery floor; he said the Union would not be good for the employees; the workers would pay the Union to do nothing, and they would go home with less money in their pockets. Williams asked McCabe if they could get together to resolve the work problems so that the Union would not be necessary. McCabe said "sure" and he told Williams to talk to the other employees and then contact him about the time and place of a meeting. After the meeting, McCabe asked Williams why everybody was upset. Williams responded that the employees were treated like nothing and they were not getting paid for all the hours that they worked. McCabe said that he would check on Williams' complaint and get back to her. Williams testified that prior to this occasion, she had complained to management that employees were not being paid for overtime hours. She also objected to being compelled to attend monthly employee lunches which were inconveniently scheduled.

That evening, according to Williams, Nash telephoned her and told her not to call his house and not to come to his house. The reason he gave was that Williams had hung up on him. Williams was upset at the abrupt nature of the breakup; she stated that the relationship soured suddenly when she and Nash "started getting into it about the Union."

On August 27, after Williams arrived at work she was called to the office by Bodden and laid off. Williams questioned the reason for her layoff and Bodden replied that Nash said that production had gone down. When Williams asked why those with less seniority than her were not being laid off, Bodden said he did not know the reason and that he had to follow instructions from Nash and Lewis.

Williams has a long job history, and after the layoff she got a job at a bakery making almost twice what she earned at Greyston. When that place went out of business, she obtained a position at a factory in Massachusetts.

Nash testified that the relationship with Williams ended at the end of July or the first week of August. He denied arguing with Williams about the Union on August 24. Nash stated that he was involved in making decisions about which employees would be laid off. Nash made his recommendations based on seniority, attendance, punctuality, attitude, and productivity.

Bodden testified that he supervised Williams and that she had a poor attitude, she was very opinionated, very negative, and she ranted and raved constantly. He stated that he warned Williams about her attitude and he told Lewis and McCabe that she had a bad attitude. Bodden recommended that Williams be laid off at the end of August because there were other trainees with a better attitude. Bodden believes that attitude is more important than attendance and performance in selecting employees for layoff. Bodden acknowledged that he had evaluated Williams every 2 weeks during the period she was employed by Respondent and that his evaluations do not show that Williams had a bad attitude.

Bodden denied that he had any knowledge of Williams' union activity when he recommended her layoff. Bodden testified that he had no opinion about the desirability of a union at the bakery. He never spoke to employees about the Union and he

never spoke to any supervisors about the Union. He denied that he ever heard McCabe refer to the Union as an outsider.

McCabe testified that he conferred with Lewis, Bodden, and Nash when he chose employees for layoff on August 27. Williams was chosen for layoff because she had previous work experience and she was highly employable.⁸ Respondent's mission, according to McCabe, is to "prioritize the truly economically disenfranchised residents of southwest Yonkers." McCabe believed that Williams was capable of making more money at another job. Another reason that Williams was chosen for layoff was that her supervisors observed that she had a bad attitude. McCabe stated that he himself saw her constantly jumping around, interrupting and disrupting other people. She was not focused on her work. Further, McCabe testified, he had conducted an important meeting with employees on August 26 and he noticed that Williams talked to the other employees and did not pay attention to what he was saying.⁹ After the meeting, Williams asked to speak to him and she complained that the timing of the monthly employee lunch was inconvenient. Williams also complained that employees were not getting paid for all the overtime they worked. McCabe decided that Williams was more interested in herself than in becoming a team member. On cross-examination, McCabe acknowledged that he had invited employees at the meeting to speak to him about problems at the Bakery. McCabe denied that he had any knowledge of Williams' activities in support of the Union when he made the decision to lay her off.

McCabe stated that he chose among seven employees in making his decision whom to lay off at the end of August 1996. These included Williams, Delroy Espinoza, Michael Ravenel, John Gwynn, Theresa Wood, Margareta Scipio, and Christopher Martin. Most of these were trainees who had not yet completed their 12-week probationary period. Teresa Wood was not a trainee, but she was chosen for layoff because had another job at the same time she was working at the Bakery. Ravenel was laid off because he was a mediocre employee. Williams was chosen because her attitude was inappropriate and because she had held jobs in the past and she was employable. Gwynn was kept because he was returning to school and his mother is a resident at Greyston housing. Scipio was not laid off because she is the single mother of three who has held only short marginal jobs. Martin was not laid off because his brother has been a bakery employee for some time. Espinoza was kept because he was beginning a college program and needed income while attending school.

5. Discharge of Sabrina James

Sabrina James worked for Respondent from January 1995 until July 30, 1997.¹⁰ James began her employment as a brownie maker; in June 1996 she became a floor starter on the brownie crew. James worked alongside all the other employees and her duties included showing new employees how to perform their work and to schedule times for breaks. At the end of her employment James was working the 10 p.m. to 6 a.m. shift; there were four or five floor starters on this shift.

⁸ Williams had worked steadily before coming to the Bakery and she had earned a higher hourly wage at other establishments than she earned at the Bakery.

⁹ This was the first meeting McCabe held to speak to employees about the union petition.

¹⁰ Sabrina James was often called "Cookie" at the Bakery.

Sabrina James testified that in August 1996, her coworker Dawn James told her about the Union.¹¹ Sabrina James handed out union authorization cards to other employees. In August, Nash told her that he knew she was behind the Union. During the first week of September 1996, McCabe asked her to come to his office one evening and they talked about her feelings concerning the Union. McCabe told Sabrina James that Dawn James was organizing the Union. Sabrina James replied that she did not know about that. Right before the election, McCabe called a meeting in the upstairs conference room which was attended by the entire brownie crew and Supervisors Nash, Lewis, and Bodden. McCabe asked the employees how they would feel about outsiders coming in to the Bakery. He also spoke about union dues. McCabe told the employees that a union was not necessary and that they should all try to work together in the Bakery. McCabe said that he had some positions that would become available in the Bakery, including one for an assistant supervisor, and he told Sabrina James that she would be named as the person for that job.

During the first week in December 1996, Sabrina James testified, Bodden asked her to come into his office. He asked how everything was running on the floor and he told her that a union coming in would not change anything.

During the second week of January 1997, McCabe met with the floor starters and supervisors of the brownie crew. According to Sabrina James, McCabe asked why the employees would want the Union and said that outside people were not needed. The employees complained that five different types of brownies were being made but that they were only paid a bonus for shipping one kind of brownie.

During the fourth week of April 1997, Sabrina James was speaking to Nash in his office. He told her that he had been informed that she was behind the Union. James denied union involvement. But Nash told her that she was a "Union bomber", and he told her "we're watching you, I know you're behind this."

In mid-May 1997, Sabrina James was speaking to Lewis and Bodden about having to work Saturdays. She said that working 6 days a week was draining her and she remarked that if the employees had a union they would not have to work Saturdays. Lewis said that the Union would not change anything. Then he asked James who else was supporting the Union. She replied that she did not know.

In the second week of June 1997, Lewis called Sabrina James into the office; Bodden was also present. Lewis told her that he disliked her, Dawn James, and Thomas Berry because he knew they were causing problems for the Bakery. When James asked what he was talking about, Lewis replied that he knew she was behind this. Then Lewis went onto the bakery floor and began shouting in a loud voice that he was campaigning for the Bakery. He asked who was for the Union and he said that they did not need the Union in the Bakery. He repeated that he was for the Bakery and he went around the floor and asked several people if they wanted the Union. Lewis said that those who felt the Bakery needed the Union should go work at McDonald's for \$5 per hour.

Sabrina James testified that in June General Manager Walls told the employees working on the floor that the Bakery was appealing the Union because they did not need a union. Then

Walls took James to the loading dock outside and asked her why she thought they needed a union. James replied that no one listened to what was going on at the Bakery.

In the first week of July 1997, Sabrina James was 10 minutes late. Bodden told her to go home. She protested that she had to work and could not afford to go home, but Bodden sent her home anyway. James testified that she had been late by a few minutes in the past and she had been written up once, but she had never been sent home before. The next week, McCabe told her that she was a good worker and that he would give her a raise from \$7.50 to \$8 per hour. She never received this raise.

On July 22, 1997, Sabrina James came to work and went on the bakery floor. She observed that Juliet Tracy was yelling and screaming about a machine called a Depositor. Bodden instructed James and Tracy to come into his office and he asked James whether she had heard Tracy talking to her. James said that she had not. Bodden began yelling at Sabrina James. He said that they were tired of James always complaining, that there was always a problem and that they were tired of James thinking everybody was against her. James asked what this was about and she repeated that she had not heard Tracy address her. Bodden told James to go home. James asked why she was being sent home and asked whether she was being fired. Bodden replied that she was not fired but that he wanted her to leave. Sabrina James went up to the employee lounge and telephoned her friend Dawn James. As the two were speaking on the telephone, an argument began between Sabrina James and Tracy. Bodden came upstairs and told Sabrina James to leave right away. James said she had not done anything wrong and that she was being treated unfairly. She began speaking to Mike Green, another employee on his break, and then she and Tracy began fighting again. Tracy made as though to attack Sabrina James with a large fork, and James picked up a radio to defend herself. Green broke up the fight. By this time, Dawn James had arrived at the Bakery to take Sabrina James home. Lewis and Bodden appeared and told Sabrina James to leave. She asked again whether she was being fired; Lewis replied that she was not being fired. Sabrina James kept asking for a document in writing in case she was being fired, but Lewis and Bodden said she was not being fired. Sabrina James denied that she threatened the supervisors on this occasion. She denied saying to Lewis, "You're going to suffer you punk mother-fucker."

On July 23, Sabrina James came to work and was told to report to the office where Supervisors Lewis, Bodden, and Jerome Lee told her that she was suspended indefinitely until they had consulted McCabe. A meeting between James and McCabe was scheduled for July 30. James came with two union representatives but they were not permitted to attend the meeting. James testified that management did not want to listen to her side of the story during this meeting. She was given a document which stated that she was discharged for insubordination following a disciplinary action and for threatening a fellow employee and a supervisor. James believed that Tracy was not disciplined for the events which led to her dismissal.

Sabrina James had one other disciplinary action on her record. She had been suspended in September 1996 for arguing with fellow employees Berlin Craig and Juliet Tracy. James stated that all three were using profanity and screaming.

Michael Green testified that that on July 22, 1997, he was on his break in the employee lounge when Sabrina James and Bodden had an argument. Green could not hear what was be-

¹¹ The record does not suggest that Sabrina James and Dawn James are related.

ing said, and he asked James what was wrong and why she was crying. Green saw Tracy go after Sabrina James with a fork and he saw James pick up a radio to defend herself. Green intervened at this point. Then Bodden came upstairs and began yelling at James. He told her to leave, but James refused to go until she was given a paper saying whether she was being fired or not. Bodden told James to go get her husband, but she said that she would handle the situation herself. At this point Dawn James came in to take Sabrina James home. Lewis appeared and told Dawn James to leave the premises. Sabrina James kept repeating that she wanted a paper to say that she was being fired, but Lewis said that she was not fired and that she should come back the next day and discuss the problem. Green did not hear Sabrina James threaten Bodden. Green recalled that during these discussions, Bodden, Sabrina, and Dawn James all used obscenities. Green's affidavit states that Bodden told Sabrina James to get out "we don't need you." Bodden said that the Bakery was tired of her because she was always complaining. Green testified that Tracy was not suspended for the incident with Sabrina James.

Bodden testified that on July 22, Tracy asked Sabrina James who was operating the Depositor and James responded in a "very nasty" manner. Bodden could not recall what he had heard James say to Tracy, but he recalled that it was negative and that it was so bad that he called her to the office. Bodden asked both employees to come to the office. When he met with Sabrina James and Tracy, he asked James why she was nasty. She responded that she had not heard Tracy. Bodden believed her response was "negative" and he told James to go home for the evening. Then Bodden heard Sabrina James arguing with Tracy in the lounge. Bodden walked up and told James to go home. Bodden telephoned Lewis to report on what happened. Eventually, Bodden recommended that Sabrina James be fired. Bodden testified that Tracy was suspended for the incident with Sabrina James, but he could not recall if Tracy was asked to go home that night. Bodden's memorandum about this incident is at variance with his testimony. The memorandum states that Sabrina James came on the production floor with "attitude" and that she failed to respond to Tracy's question about the depositor. The memorandum continues that Bodden and James got into a shouting match after he criticized her and that he told James to go home. Then, according to Bodden's memorandum, Tracy reported to him that Sabrina James was nasty to her upstairs in the lounge. Bodden again told James to leave but she refused to go without a piece of paper saying that she was fired. After Dawn James came to take Sabrina James home, Bodden heard Dawn call him a "punk mother fucker." As Sabrina James was leaving, she tripped and Bodden heard her say she wished she had fallen and had been able to sue the Bakery.

Lewis also drafted a memorandum concerning the events of July 22. The document states that he was called to the Bakery by Bodden because the latter was having a problem with Sabrina James. Bodden told Lewis that he had sent James home for having a nasty attitude on the production floor and for being hostile to him. When Lewis arrived at the Bakery he found that Sabrina James would not leave the Bakery without a paper saying that she was fired. Lewis' memorandum quotes both Sabrina and Dawn James as using obscenities to Bodden and reports that Sabrina James expressed the wish that she had fallen so that she could sue the Bakery.

General Manager Julius Walls testified that he met with Bodden and Lewis about the incident of July 22. Walls read a

memorandum prepared by Tracy.¹² Walls also met with Sabrina James. Walls recommended to McCabe that Sabrina James be terminated. He stated that his recommendation was not made on the basis of Sabrina James' union activity. The grounds for his recommendation were based on James' actions towards her supervisor, a threatening statement she made to Tracy, and her statement that she wished she had fallen so that she could sue the Bakery. Walls testified that Tracy was not disciplined in any way for the events of July 22.

McCabe testified that he had complimented Sabrina James for trying hard at work, but he denied promising James a promotion. McCabe stated that James was discharged for insubordination and a lack of willingness to respond to a suspension. McCabe relied on a warning in James' record from December 1996, stating that any further actions would lead to termination.

6. Discharge of Berlin Craig

Berlin Craig was hired in June 1994, to work on the brownie crew. After some time, Craig helped to train new employees. Craig attended one union meeting during the organizing campaign and she signed an authorization card for the Union.

In early March 1997, Craig came to work wearing earrings contrary to bakery policy. When Supervisor Lewis pointed this out to her, she said she had forgotten them and she left the floor to remove the earrings. A few weeks later, Craig complained to Lewis and McCabe that she had worked fewer hours than normal due to an oven break down but that employees with less seniority had worked more hours. Craig testified that after this incident Lewis went around the bakery floor saying, "[Y]eah, we gonna get rid of the old whores and get some new whores up in here." In mid-March 1997, Craig took a test to get a third year anniversary raise. She told Supervisor Nash that she did not understand why she had to take a test for a 25-cent raise. He replied that she had been up for a raise before "this Union thing started." Nash remarked to Craig that she had undergone an "attitude" change after the Union came around. Sometime later, Craig came to work on a day when she felt ill. Lewis insisted that she was not sick and told her that she was a "pain in my ass." Craig had informed a fellow employee that she was looking for a new job, and Lewis said he could not wait until she got a new job.¹³

Craig testified that she and Sabrina James had an argument on the floor of the Bakery. On December 19, 1996, Craig was given a 2-day suspension and warned that she would be terminated if the incident occurred again. Craig's only other written warning was for lateness on February 26, 1997. Bodden testified that he warned Craig for the fight with Sabrina James; it involved profanity and almost came to violence. According to Bodden, Craig, and Sabrina James screamed at each other on another occasion, but he did not write them up.

On April 11, 1997, Lewis came on the bakery floor and saw that Craig and Carol Mitchell were sorting brownies in the

¹² Tracy did not testify in the instant hearing.

¹³ The General Counsel presented the testimony of Carol Mitchell to support the testimony of Craig and of other witnesses. However, Mitchell gave her testimony in response to questions which were for the most part leading. Mitchell stated that McCabe threatened that if he found out who started the Union, that person would be fired. No other witness testified to that effect and I find Mitchell's statement incredible. I find that Mitchell's testimony is not reliable and I shall not credit it.

breaking area.¹⁴ Craig and Mitchell had called all the people from the sending table over to help them because work had been piling up on the breaking table. Lewis asked why no one was in the sending area. Mitchell answered Lewis' question. Lewis remarked that he had been talking to Craig too. On direct examination Craig testified that she did not say anything in response to Lewis' comments. On cross-examination, Craig recalled that she told Lewis that she was doing what she got paid for and that he should do his job. Then, Lewis said to Craig, "[T]hat's why you are first on the list to get fired." Craig told Lewis not to threaten her; if he wanted to fire her, then just do it. Craig denied that she screamed at Lewis on this occasion and she denied that she taunted Lewis to fire her. Craig was sent home and instructed to come back the next day. When Craig returned to work, Lewis asked her what was the problem. She replied that he could not talk to her the way that he had been talking to her. Lewis said he could talk any way he wanted. Craig said he could not threaten to fire her. The two then accused each other of having an attitude problem. Finally, Lewis told Craig that she was fired. Craig testified that she cursed at Lewis after he fired her. On April 14, Craig was issued a termination notice signed by McCabe informing her that she was discharged for "failure to follow job instructions, insubordination, threatening your supervisor, and extreme indecent and offensive language on bakery property."

Lewis testified that he treated Craig just as he treated the other employees with respect to their hours. He denied calling any employees "whores." On Friday, April 11, Lewis testified, he saw five employees near the breaking table and he asked the senior people, Craig and Mitchell, why no one was in the sending area. Mitchell replied but Craig muttered and turned her back. When Lewis addressed her directly, she said she was doing the job she was paid for, breaking up brownies, and she told him to do his job. Then she said in a hostile manner, "[W]hy don't you all just fire me, just fire me, fire me." Lewis excused her for the rest of the evening because he could not tolerate misconduct on the bakery floor in front of trainee employees. On Saturday, he informed McCabe of the incident and they decided to suspend Craig. When Craig came to work that day, he informed her of a 5-day suspension. At that point, according to Lewis, "all hell broke loose." Craig began shouting, she screamed that it was unfair, and she used the term "bitch-ass mother fucker" to him, saying "you'll get yours, just fire me." That day, with McCabe's assistance, Lewis prepared a statement describing Craig's actions. The statement describes Craig's conduct and states, "Her behavior is unbearable a negative force on the production floor she is not a team player. This is not the first incident that has occurred. She has been spoken to about her behavior on several occasions." The statement concludes that Craig was terminated with approval of McCabe. However, Lewis did not tell Craig she was fired on that day.

Nash denied telling Craig that she had been up for a raise before the Union came and he denied saying that Craig's attitude had changed since the Union came around.

Lewis testified that he had no knowledge of any union activity by Craig when he terminated her.

Maintenance Supervisor Jerome Lee testified that he heard the conversation between Craig and Lewis on April 12. Lee testified that Craig said, "[F]ire me, you bitch-ass mother fucker."

McCabe testified that Craig had been a wonderful employee but that after her fight with Sabrina James in December, she became obstinate and difficult to supervise. The day before her termination, she had refused to follow Lewis' directions, and McCabe and Lewis had decided to give her a 5-day suspension to "get her attention." When Lewis notified Craig of the suspension, she started screaming and yelling, calling him bitch-ass mother fucker. Lewis decided to fire Craig and he called McCabe for support. McCabe agreed that Craig should be fired based on the cumulative impact of all her behavior.

7. Thomas Berry

Thomas Berry began working on the brownie crew in February 1993. Berry eventually moved to the cakes and tarts departments, making shells for tarts. In December 1997, Berry went on a leave of absence for training to become a truck driver.

Berry testified that he and Dawn James obtained authorization cards and asked other employees to sign them. In August 1996, Berry handed out union cards to employees on the production floor. General Manager Julius Walls told Berry that he should take no offense but that the Bakery would not permit him to engage in that activity. Berry apologized. Berry recalled that in early October 1996, McCabe held an employee meeting during which he displayed a questionnaire from Ben & Jerry's which asked whether the Bakery was unionized.¹⁵ Berry asked McCabe if that meant that the Bakery might lose the Ben & Jerry's account if the Union won the election. McCabe replied that it might mean that. Then McCabe told Berry that he was surprised that he had gone for the Union because he was a long-term employee. Berry replied that he was trying to open lines of communication.

In November 1996, according to Berry, Supervisor Lee told him that "they" were trying to get Berry out of there. When Berry asked if that was due to the Union, Lee said, "[W]hat do you think?"

Berry testified that in February 1997, Lewis came to the production floor and pointed to him and Dawn James, telling each of them they, "ain't shit." At about this time, Berry told McCabe that he was upset and the walls were closing in on him. McCabe told Berry to leave. Berry asked if he was fired, and McCabe said no. Then McCabe offered to pay for truck driving school for Berry. Also at about this time, according to Berry, Lewis tried to provoke him into a fight. Lee stopped Berry and told him that they were trying to provoke him to get him out of there. Later, Walls and Lewis spoke to Berry. Lewis said he did not like Berry because he was for the Union. He said anyone who was for the Union did not belong there. Walls told Berry that he was trying to bring down the Bakery. He said, "We are trying to build something here and the Union will not do anything for you." Walls was yelling and Berry yelled back. According to Berry, Walls said that Lewis could say "anything he wants to about the Union, but I can't." The next day, Lewis apologized to Berry. He told him that the bakery had done a lot for them but that they were trying to break it down; the Union would destroy the Bakery. Lewis told Berry that as a long-term employee he should know better than to bring in the Union. In May 1997, just before a union meeting to discuss contract demands, Nash asked Berry what the em-

¹⁴ This is the process to remove undesirable pieces.

¹⁵ The meeting was attended by about 12 unit and supervisory employees.

ployees wanted. Berry refused to discuss the subject with Nash. Then Nash said the Union would not come into the Bakery.

Berry testified that in June 1997, Walls asked him how many shells he could make in an hour. Soon after this, Berry was put on a time schedule. He had to make 160 tart shells in 2-1/2 hours. Berry maintained that he was the only employee placed on a timed production schedule. Berry told Walls that he could not make 160 shells in that time period without help and Walls replied that he was conducting an experiment. Berry also reminded Walls that there was not enough oven space to produce 160 shells in such a short time span. Berry said he would tell the Union about this "nonsense" and the next day an employee named Rodney was also put on a production schedule. In the first week of October 1997, Berry went to see McCabe to complain that he could not stand the arguments with Walls. Berry told McCabe about the problem with the time schedule and McCabe remarked that the Union could not change production. The production schedules for July 10 through October 23, 1997, were introduced into evidence by the General Counsel. They show that on July 16, Berry was scheduled to produce 90 shells in the space of 2-1/2 hours. Other tasks included baking, depanning, and mixing items and various times were assigned to the tasks. The next day Berry again had times assigned for each task to be performed. On July 18 and 21, both Berry and a team composed of employees Rodney and Florence had completion times indicated for each task assigned. Thereafter, the production sheets contained no time limits for the completion of tasks by employees. None of the documents introduced into evidence support Berry's testimony that he was asked to make 160 shells in 2-1/2 hours.

Walls testified that he had seen employees having conversations on the production floor. He acknowledged telling employees that they could not stop production to talk but that they should conduct their conversations on breaks. Walls denied that he had placed Berry on a production quota. Walls testified that the cake and tart department was not cost effective and that he wanted to improve production. In an effort to improve the performance of the department, Walls wanted to calculate how much it cost to produce certain items and so he asked employees what type of production they could achieve in certain time frames. Walls wanted to get a sense of what could be produced in a day so that he could plan production more efficiently. Berry told Walls that he could produce a certain amount of items within certain time limits, and Walls listed the information he got from Berry on the production schedules. After a few days, Walls could not keep track of the information and he stopped recording the times and tried to rethink how he was recording production. Walls testified that there was no penalty imposed on employees for failing to meet production schedules.

McCabe denied that he promised Berry education benefits to induce him to resign from the Bakery. According to McCabe, Berry did not have money to pay for truck-driving school and McCabe offered him a small amount as tuition assistance but this was not conditioned on Berry's resignation.

8. Dawn James

Dawn James began to work at the Bakery in July 1994. She was made a floor starter in February 1997, with a wage of \$7.50 per hour. James worked various shifts at the Bakery; when she ceased working, she was on the 10 p.m. to 6 a.m. shift.

James was active in the Union's organizing campaign. She held a meeting at her house and she handed out cards to various employees. James testified that one day she met with McCabe in his office; McCabe told her that every time he heard the word "Union" James' name came up. McCabe spoke about the union officials' salaries and told James to give him a year to effect changes without the Union. On September 30, 1996, just before the election, a memorandum was given to employees highlighting a decision involving the Union. Craig and Nash were discussing the document and James told Craig not to pay attention to it. Nash responded by telling Dawn James that she was the union bomber and that she did not know the facts because the Union was lying to her. Dawn James testified that McCabe held a preelection meeting during which he stated that if the Union came in the Bakery would lose its contract with Ben & Jerry's.

Dawn James stated that in December 1996, Lewis told her, Craig, Sabrina James, and Carol Mitchell that they were always complaining and that he would get rid of them. He said, "I will get rid of you whores and get four new whores."

In January 1997, Dawn James took the test to become a floor starter but her promotion and raise were slow in coming. McCabe had said that as soon as Nash gave the word she would get the raise, but Nash kept telling James that no raises would be given out because the Bakery had to pay the lawyers in the case with the Union. James stated that when she finally got a raise in February it was for 50 cents instead of the \$1 she had been "expecting."

Dawn James testified that in March 1997, she was working nights at the bakery and going to school to become a cable installer. She was scheduled to work Saturdays. James told Lewis and Bodden that she wanted to change her hours to 6 p.m. to 2 a.m. in order to accommodate her school schedule. Lewis told her that there was no such shift, but that she could work the 6 p.m. to 12 a.m. shift. James refused because she would have lost 2 hours of work. One week later, James made up a schedule and showed it to Lewis and Bodden who refused to implement it, telling her that she could not write up her own schedule. In April, James was informed by Bodden that there would be a change in her day off. When James told him that it would be a problem, Bodden told her to call McCabe. James telephoned McCabe and explained that she was trying to go back to school. According to James, McCabe replied that he saw no reason to help her due to the fact that she was always trying to bring the bakery down and that she was involved in something negative. When James charged him with referring to her union activities, McCabe said, "Union or no Union, you should learn how to stay away from certain situations, you're always involved in something." McCabe promised to speak to Bodden about James' schedule.

On April 10, 1997, Dawn James testified, she had an accident at about 5:30 a.m. She was helping to clean the production floor when she fell into a drain hole. James went to the medicine cabinet and tended to her right pinky finger which had been injured. She informed a supervisor of the injury to her finger. Then she went back to work. A few hours later, James went to the emergency room for a sprained ankle and sprained knee. At 5 p.m. that day, she called the Bakery and told Bodden that she had fallen and injured her knee and ankle. Bodden asked why James had not told him about this at the time. James explained that she did not think the leg injury was that serious because she could walk on her leg, but that after

she left work it had gotten worse with swelling and pain. On April 17, she saw a doctor who told James that he would call Respondent for an accident report. James then heard from the doctor that there was a discrepancy about the accident; the employer had reported a left hand injury but not a leg injury. After a few days, James applied for workers' compensation. When she went to the Bakery to bring a note saying that it was not determined when she would be able to report back to work, Jerome Lee told her that the supervisors were saying that she was trying to scam the Bakery and he said they knew of her involvement with the Union. Lee said that the Union would not come in and that they would deny her compensation. Lee said that Bodden would not change his accident report. James received a letter from the State Insurance Fund in May instructing her to return to work, but she did not go back because her ankle and knee were still swollen. In July, James went to the Bakery to collect a check for the vacation days that were owing to her. She testified that she spoke to Nash who asked her why the Union was not helping her to collect compensation. Nash said there was a position open and he asked if she would take an office job. James replied, "Why not?" James spoke to Lewis about returning to work and she told him that she could only do light duty. Nash could not help her and he suggested she speak to McCabe. In August, James spoke to McCabe about her workers' compensation claim. He asked James why it had taken her 4 months to call him. McCabe told her that they believed she had left work with only a finger injury and for all he knew the leg injury was the result of a car accident James had been involved in. In December, James told McCabe that she was looking for a light-duty job; he did not offer her any work. James recalled that she had tried working as a receptionist at the bakery, but she had to go back to the brownie crew because people were not receiving their messages. James acknowledged that she has had a number of accidents at the Bakery and that she is familiar with the procedures for obtaining benefits from workers' compensation and the State Insurance Fund.

Dawn James testified that on July 22, 1997, she had received a telephone call from Sabrina James who was crying that the bakery was trying to set her up in order to get rid of her. During the telephone call, Dawn James could hear Sabrina James and Juliet Tracy cursing. Dawn James went to the Bakery to get Sabrina James. She was trying to convince Sabrina James to leave when Bodden and Lewis appeared. Sabrina said she had been fired and she asked for a paper stating that she was discharged. Lewis denied that he had fired Sabrina James, but he told Dawn James and Sabrina James to leave the premises. As Dawn James was leaving, she called Bodden "a fat punk mother fucker." But she did not hear Sabrina curse or threaten a supervisor. On July 31, McCabe sent Dawn James a letter denying her access to the production floor and employee lounge and instructing her that she could enter the Bakery only through the front door. She telephoned McCabe and told him that she had no problem with the letter. Carol Mitchell gave unrefuted testimony that former employees of the Bakery had been allowed on the premises and that she herself had entered the Bakery while she was out on medical leave without challenge from two supervisors who saw her.

McCabe testified that Dawn James called him at home on March 4, 1997, at 2 a.m. She said the team captains were not willing to change her hours to accommodate her desire to take a course. McCabe told her to deal with the captains. He denied telling James that her name came up every time he heard about

the Union. McCabe denied that he had refused to accommodate James' work schedule conflicts because she supported the Union.

McCabe testified that he restricted Dawn James' access to the production floor and employee lounge because she had been disruptive. She was receiving workers' compensation benefits and she was not working. However, James was not prohibited from meeting with personnel employees during working hours.

Respondent presented evidence concerning James' injury on the job. On April 21, 1997, the Bakery's personnel officer informed the State Insurance Fund that James had fallen and scraped the pinky of her left hand. On May 16, Respondent was informed that Dawn James' workers' compensation claim had been received. On May 27, an investigation was opened and on June 3, McCabe was interviewed by an investigator. McCabe gave a statement that described the injury to James' finger and stated that as far as he knew this was the extent of her injury. McCabe also told the investigator that on April 17 the Bakery received a telephone call from Yonkers General Hospital asking for the name of the carrier because James had sought treatment for an injury she sustained on the job. On July 14, Respondent received a notice that James' claim for disability benefits was rejected and that James was advised to file for workers' compensation. McCabe testified that James called him in early August and gave him some information connected with her pursuit of a disability claim. McCabe did some research and sent James a letter dated August 11, 1997, informing her that her disability claim had been rejected because "the Workers' Comp claim is still open and that comes first." The letter goes on to say that McCabe had called the Bakery's insurance carrier and asked her to make sure that James' claims were being handled fairly.

Discussion and Conclusions

1. Respondent's antiunion animus

I find that Respondent expressed antiunion animus. Although McCabe testified that he had no opinion one way or another about the desirability of the Union and that he did not attempt to convince the employees that they did not need the Union, the evidence shows that the opposite is true. As quoted above, from the time that the Union filed its representation petition, McCabe told the employees in meetings and in letters that the Union was an outsider consisting of officials who would use employee dues, fines, and assessments for their personal gain and that "it would be better for all of us to continue to try to solve our problems together as we have in the past—without the intervention of a stranger." McCabe urged the employees to "vote NO" in the election. (Emphasis in original.) Furthermore, right after the Union filed its petition, McCabe furnished the employees with his telephone number at home, on a pager and at work and invited them to call him "at any time." General Manager Julius Walls testified that he did not think the employees needed a union. Production Coordinator and Team Captain Edward Lewis stated that he was not happy when he heard about the union organizing and that he thought it was an "outsider" which could harm the Bakery. Maintenance Supervisor Jerome Lee testified that he did not care whether the Union came to the Bakery. However, Lee believed that the only employees who wanted a union were those who spoke negatively about the Bakery and did not recognize all that it had done for people. Irene Williams testified credibly that Supervisor Gary Nash told her that the Union was not so great and that

it would come in and mess things up. Bodden testified that he had no opinion whether the Union was good for the Bakery and he denied speaking to employees or supervisors about the Union. He said he never heard McCabe refer to the Union as an outsider. I do not credit Bodden because the record shows that McCabe constantly used the term "outsider" when referring to the Union in meetings attended by supervisors and in the many documents that were sent out during the campaign. Further, Bodden testified that Williams had a poor attitude whereas his contemporaneous evaluations of Williams show that he rated her highly for her attitude. Bodden's willingness to give inaccurate testimony to justify Williams' layoff renders all of his other testimony suspect as well.

Furthermore, I find that the record shows that Respondent engaged in various violations of Section 8(a)(1) of the Act which will be discussed below. These violations are further evidence of Respondent's antiunion animus.

2. Irene Williams

I credit the testimony of Irene Williams who impressed me as a reliable witness. The documentary evidence shows that Williams was given high evaluations during her probationary period which was ending just as the union campaign began. Williams received very high scores for her "attitude" on the job. Inexplicably, when Respondent was obliged to select a number of employees for layoff on August 27, 1996, Williams was among those chosen because, Respondent's witnesses maintained, she had a bad attitude. Thus, Nash was involved in the decision to select employees for layoff and he cited as his criteria those categories in which Williams had been highly rated, including "attitude." Bodden, who had evaluated Williams every 2 weeks for 3 months and had given her very high ratings in categories including "attitude," testified that he recommended Williams for inclusion in the layoff because she had a poor attitude, she was very opinionated, very negative, and she ranted and raved constantly. Bodden's evaluations do not offer even the merest hint of any failings on the part of Williams. McCabe also cited William's alleged poor attitude. In addition, McCabe saw Williams interrupting and disrupting other people: for example, when he met with employees about the union petition Williams talked to the other employees and then complained to him about wages and working conditions. I do not credit Nash, Bodden, or McCabe about Williams' attitude. I find that these witnesses are testifying contrary to their own documentary evidence. I find that what they faulted in Williams' attitude was that she was involved in the Union organizing campaign and that she was vocal in speaking out about wages and working conditions. The evidence shows that Respondent was well aware of Williams' union activities when it selected her for layoff. Williams had been involved in a social dating relationship with Nash and I credit her that she informed Nash about her support for the Union and that they argued about the Union. I credit Williams that Nash called her a union agent in early August and that he broke off the social relationship with her at the end of August, just before she was laid off. Nash was a supervisor and his knowledge of Williams' union activities may reasonably be imputed to Respondent. And McCabe was clearly aware of Williams' support for the Union by August 26 when he held a meeting with employees and invited Williams to speak to him about the employee's complaints and arrange a meeting to discuss them further. In summary, I find that Respondent has given a patently untrue,

and therefore pretextual, rationale for selecting Williams for layoff and that the true reason for her layoff was that Respondent was aware that she engaged in activities in support of the Union. Respondent's antiunion animus has been established above. Respondent thus violated Section 8(a)(3) of the Act when it selected Williams for layoff on August 27, 1996.

The General Counsel alleges that after the meeting of August 26 conducted by McCabe to discuss the Union with the employees, Respondent violated Section 8(a)(1) of the Act when McCabe asked Williams why the employees were upset. I do not find that McCabe's question was unlawful. Williams testified that she had asked McCabe to meet concerning the employees' "work problems" and McCabe agreed that a meeting could take place. In view of Williams' request, I do not find it unlawful for McCabe to ask her what the employees were upset about.

3. James Edmonson

James Edmonson was a witness who testified about certain incidents in great detail but with great difficulty in remembering dates. However, I do not find that his failure accurately to recall dates requires me to disregard his testimony: because Edmonson was discharged on August 26, the day McCabe held a meeting to tell employees that the Union had filed a petition, any workplace events he testified to must have taken place before August 26. Edmonson was instrumental in organizing the Union at the Bakery, and it is undisputed that he distributed cards both inside and outside the Bakery. I credit Edmonson that sometime before he was discharged in August 1996, while he and Supervisor Jerome Lee ate lunch outside a store, Lee asked him if he was trying to start a Union and told him that Supervisors Nash and Lewis were trying to find out who was involved in this effort. Edmonson admitted his role. I do not credit Lee's denials that this conversation took place because Edmonson's narrative is replete with details which give it the ring of truth and because Lee admitted that he and Supervisors Nash and Lewis discussed why the employees would want a union and who started the organizing. Further, I have found above that Nash was aware of the union campaign in August because of his social dating relationship with Irene Williams who was another union supporter at the Bakery. I find that Lee's question was an unlawful interrogation: Lee asked a specific question about Edmonson's union activity and placed his question in the context of a concerted effort by supervisors to find out who was involved in the Union. Respondent thus violated Section 8(a)(1) of the Act.

The facts relating to Edmonson's discharge are not in dispute. Edmonson was fired ostensibly because he was late to work on August 21 and because he was absent the next day without giving the Bakery any notice. Respondent's antiunion animus is well established and I have found above that by the day of Edmonson's discharge, Respondent's supervisors were aware of his union activity. Thus, I find that a motivating factor in Edmonson's discharge was his support of the Union. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Further, I find that had Edmonson not engaged in union activity, he would not have been discharged for tardiness on August 21 followed by a "no-call, no-show" on August 22. The employee handbook quoted above provides, in essence, that three unexcused latenesses or absences in a 30-day period will result in discipline depending on the employee's previous record and that tardiness

and excessive absenteeism may result in discharge without prior discipline. The evidence shows that Respondent has not enforced its attendance rules in a consistent manner and that employees are often treated more leniently than the handbook would suggest. Thus, a comparison of the discipline imposed on Edmonson for his failings on August 21 and 22 with other instances of discipline is in order. First, a comparison with past discipline meted out to Edmonson himself shows that within a 30-day period beginning May 31 and ending June 11, 1996, Edmonson had been late once, had received a second warning slip for lateness and had received a 1-day suspension for being a "no-show, no-call." The 1-day suspension was in accord with the handbook guidelines. This suspension was cited as prior discipline when Bodden signed an absence report on August 22 and said that Edmonson would be discharged. Contrary to the handbook guidelines quoted above, Edmonson was discharged for attendance problems that did not arise in the 30-day period directly following the last discipline on June 11. If the handbook had been followed, a suspension would have been imposed. Other employees were disciplined according to the handbook guidelines. Jamel Kerson was given a 1-day suspension for three attendance infractions occurring in a 30-day period from October to November 11, 1996. Jonathan Dixon was given a 3-day suspension on August 28, 1995, for lateness on August 1, absence on August 4, and absence on August 25; in addition, Dixon had been suspended on August 16 for failing to follow instructions. Thus, Dixon's punishment followed the handbook guidelines even though his record included a suspension for insubordination. Although Respondent contends that Edmonson had been warned orally for other attendance problems which were not written up, it is reasonable to assume that the same is true for other employees. Respondent defends the disparate treatment given to Edmonson on the ground that he was a "head mixer" and thus more important to the bakery than other employees and by arguing that the Bakery was lenient with certain people because they had personal problems. The documentary evidence does not support the contention that Edmonson was a head mixer. Even if he were head mixer, Respondent has not explained why the handbook was followed when, as a head mixer, he was late or absent in May and June but it was not followed in August. Finally, as shown by McCabe's testimony, all of the bakery employees had personal problems. Respondent has not shown why Edmonson's personal problems were of less moment than those of other employees. I find that if Edmonson had not engaged in activities in support of the Union, Respondent would not have discharged him. Thus, Respondent violated Section 8(a)(3) of the Act when it discharged Edmonson.

4. Sabrina James

Sabrina James solicited authorization cards for the Union. She was repeatedly identified as a union supporter by supervisors of Respondent. In the fourth week of April 1997, Supervisor Nash told Sabrina James that she was behind the Union and that she was a "union bomber." When James denied union involvement, Nash said, "[W]e're watching you, I know you're behind this." I credit Sabrina James' testimony. Nash did not specifically deny this conversation, although he generally denied that he threatened employees or told them that their activities were under surveillance. Further, I have found above that Nash is not a credible witness with respect to his relationship with Williams and her selection for layoff, and I do not credit

his testimony in this instance. Nash's comments to Sabrina James that she was behind the Union and that Respondent was watching her would reasonably cause an employee to believe that her union activities were under surveillance. Respondent thus violated Section 8(a)(1) of the Act. In mid-May 1997, Supervisor Lewis told Sabrina James that a union would not change anything and he asked James who else was supporting the Union. I credit James and I find that Respondent interrogated James about employees' union activities in violation of Section 8(a)(1) of the Act. In the second week of June 1997, Lewis told Sabrina James that he disliked her and Dawn James and Thomas Berry because they were causing problems for the Bakery and that he knew that James was behind this. Then Lewis went out to the production floor and started shouting that he was for the Bakery and that a union was not necessary. He went around the floor and asked several people if they wanted the Union and said that those who favored the Union could work for McDonald's at \$5 per hour. I credit James' testimony about this incident because it was detailed and specific and because Lewis' general denial that he mentioned the Union is not plausible. Lewis said he got "vibes" about negativity from employees but he could not provide any specifics and he continued to deny that he discussed the Union with any employees. I find that Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals because they supported the Union and by interrogating them about their support for the Union.

I credit Sabrina James about the events of July 22, 1997, which led to her discharge. As found above, Respondent's supervisors were watching James' union activities; they interrogated her about the activities of other employees, they told James that her activities were causing trouble for the Bakery and were the cause of a dislike for her and they threatened her with unspecified reprisals. Thus, Respondent's hostility to James because she supported the Union are amply documented and had been directly expressed to James by her supervisors. I do not credit the testimony of Bodden about the incident. First, I find that Bodden is an unreliable witness because he was not truthful about the reason for firing Williams, he claimed that he never heard McCabe characterize the Union as an outsider although this was a constant theme at the bakery, and his testimony at the hearing was at variance with his memorandum about the incident. Further, Bodden testified that Juliet Tracy was also disciplined for fighting with Sabrina James and the record shows that this is not accurate.

I find, based on the testimony of Sabrina James, Michael Green, and Dawn James and based on the memorandum of Bodden, that on July 22, Sabrina James heard Tracy yelling about the Depositor machine. Bodden decided that James had a bad attitude because she did not respond to Tracy and he criticized her, saying that they were tired of James always complaining. Bodden then instructed Sabrina James to go home. Bodden and Sabrina James got into a shouting match after Bodden made his comments. James asked why she was being sent home and whether she was fired. She asked for a document clarifying her status. Sabrina James went upstairs to telephone Dawn James who was to come and take her home. While Sabrina James was on the telephone, Tracy came upstairs and an argument began. Tracy attacked James with a large fork and James picked up a radio to ward off the blow. Michael Green intervened. Tracy reported to Bodden that Sabrina James had been nasty to her and Bodden came upstairs

and began yelling at Sabrina James. When Dawn James came in, she joined the argument. Eventually, Dawn James, Sabrina James, and Bodden all used obscenities. Bodden told Sabrina James to get out and that the bakery was tired of her because she was always complaining. Sabrina James did not threaten her supervisors by saying that they would suffer. After this altercation, Respondent decided to discharge Sabrina James, citing as reasons that she was insubordinate and threatened a supervisor, that she threatened Tracy and because she said she wished she had fallen and could sue the Bakery. I find that it was not unreasonable for Sabrina James to be upset by Bodden's actions toward her. Bodden, who was ostensibly criticizing James for failing to respond to Tracy, was also attacking James' union activities by telling her that they were tired of James always complaining. James had already been the butt of violations of Section 8(a)(1) and she had been told that her supervisors disliked her because she supported the Union. Further, after Sabrina James went upstairs, Tracy followed her and an argument ensued during which Tracy made as though to attack James with a fork. Tracy was not disciplined for this action, but Bodden came in and yelled at Sabrina James. Thus, Sabrina James had ample provocation for being upset. I do not find it significant that she used obscenities to Bodden because the evidence shows that his language was the same as James'. Further, the evidence does not show that Sabrina James threatened Tracy, rather it shows she had to ward off an attack by Tracy. I do not find that James was insubordinate. I do not find that Sabrina James' exclaimed that she wished that she had fallen and could sue the Bakery because the witnesses who testified to this statement are unreliable. However, even if James had said this, it would not be unreasonable under the circumstances. To sum up, Respondent provoked Sabrina James by treating her unfairly and unlawfully and then it used her reaction as a pretext to fire her. Further, Respondent's witnesses testified inaccurately about what Sabrina James' actions before her discharged. I find that Respondent discharged Sabrina James because she supported the Union and that this constituted a violation of Section 8(a)(3) of the Act. During the events of July 22, Respondent violated Section 8(a)(1) of the Act by telling Sabrina James that it was tired of her because she was always complaining, a clear reference to her activities on behalf of the Union.

5. Berlin Craig

Berlin Craig testified that her sole union activity consisted of attending a union meeting during the organizing campaign and signing an authorization card. Craig did not engage in any other actions that would call her to the attention of Respondent. Although Craig testified to several incidents where she complained about problems at the Bakery, these were all personal to her and would not lead management to identify her with the Union campaign. Indeed, Craig quarreled with Sabrina James, a known union supporter. Management was aware that Craig was looking for a new job at this time, a fact that would tend to deny Respondent a motive to get rid of her as a union supporter. I am not convinced by Craig's testimony that Nash made comments linking her to the Union. The evidence shows that Craig was warned for a fight involving profanity and near violence with James on December 19, 1996, and that she was warned orally by Bodden for another screaming match with James. I credit McCabe's testimony that after the December 1996, fight with Sabrina James, Craig became difficult to su-

pervise. Craig's testimony about the incident of April 11, 1997, that led to her discharge was inconsistent: at first, she testified that she did not respond to Lewis' question about the absence of employees in the sending area, but on cross-examination, Craig admitted that she told Lewis she was doing what she got paid for and that he should do his job. I credit Lewis' version of this incident, and I credit him that Craig was insolent and that she taunted him to fire her. I credit Lewis that when he informed Craig of her suspension the next day, Craig shouted at him and called him a "bitch-ass mother fucker". I find that Respondent suspended and then discharged Craig for her cumulative behavior and not because she supported the Union.

6. Dawn James

Dawn James was active in the campaign, soliciting authorization cards and holding a meeting at her house. James was identified as a union supporter by the Respondent. I credit Dawn James that McCabe, Nash, and Lewis all made comments mentioning her support of the Union. I credit Dawn James that when she telephoned McCabe in early April 1997, to ask him for help with her schedule, McCabe exclaimed that he saw no reason to help her because she was always involved in something negative and she was trying to bring the Bakery down. I do not rely on McCabe's denial. McCabe's testimony about his attitude toward the Union does not inspire confidence in its accuracy. McCabe testified that he had no opinion about the Union but that he just wanted a fair election. Yet McCabe engaged in an intense letter writing campaign against the Union and he told the employees to "vote NO." I find that McCabe was referring to Dawn James' union activities when he said that he had no reason to help her. I find that Respondent threatened Dawn James with unspecified reprisals in violation of Section 8(a)(1) of the Act. I find that Dawn James' testimony that Jerome Lee mentioned knowledge of her involvement with the Union in the same conversation in which he accused her of trying to scam the Bakery with a workers' compensation claim is ambiguous. As detailed in James' testimony, there was a real question about her leg injury and the manner in which she filed her various claims. James waited a long time before trying to straighten the matter out, and the General Counsel does not allege that Respondent in fact engaged in any illegal activity in connection with James' claims. Dawn James' report of Lee's comments can easily be read to mean that the supervisors thought she was trying to scam the Bakery by adding a leg injury to a pinky injury and that the supervisors were not going to change their accident report because James left the Bakery having reported only a pinky injury. James' testimony that "they" would deny her compensation can be read to refer to the State authorities. Moreover, I do not find it credible that Lee told her that the Bakery was aware of her union activities in late April 1977. Dawn James' support for the Union was not news then, and her testimony about the conversation with Lee does not ring true. I do not credit Dawn James that in July 1997, Nash asked her if she would take an office job. James acknowledged that she had previously tried working as a receptionist at the Bakery but that since she failed to perform adequately she had returned to a job on the production floor. In these circumstances, and given the fact that James was an active union supporter, I do not believe that Nash offered her an office job to induce her to abandon her support for the Union. Finally, I do not find that Respondent violated the Act when it barred Dawn James from the production floor and employee

lounge. James was not working. Further, when James had gone to the Bakery to take Sabrina James home on July 22 she had done more than act as a chauffeur. All the witnesses agree that Dawn James injected herself into the argument between Sabrina James and Bodden. Dawn James testified that she called Bodden “a fat punk mother fucker.” The General Counsel has not presented any evidence to justify Dawn James’ shouting and cursing at Bodden. Although other nonworking employees were not barred from access to the production floor and employee lounge, there is no evidence that they had used obscenities and engaged in an unprovoked shouting match with supervisors.

7. Thomas Berry

I find that Thomas Berry was a truthful and cooperative witness whose recollection was not always in accord with the documentary evidence. Although I believe that Berry tried to give accurate testimony, I find that his memory was not always reliable. Thus, Berry testified that he was put on a production quota and that he was obliged to make 160 tart shells in 2-1/2 hours. But the documentary evidence shows that he was scheduled to produce only 90 shells in that time. Berry did not testify that 90 shells in 2-1/2 hours was unreasonable or impossible to perform. I credit Wall’s testimony that he was trying to keep track of production and that he recorded Berry’s estimate of what tasks he could perform on a production schedule. I credit Wall’s testimony that there was no penalty for failing to meet a production schedule. Further, the documentary evidence shows that on 2 days, Berry was the only employee with specific times listed for various tasks, and on the next 2 days Berry and a team of employees had such times listed. Thereafter, no times were listed for any employees. This evidence supports Walls’ testimony that he began trying to record production but that he soon abandoned the effort because he could not use the information. I find that Berry’s testimony about his conversations with supervisors concerning the Union is generally accurate. I credit Berry that McCabe told him early in the union campaign that he was surprised he supported the Union. I credit Berry that in November 1996, Lee told him “they” were trying to get Berry out. I credit Berry that in February 1997, Lewis told him and Dawn James that they “ain’t shit.” I credit Berry that when he went to McCabe in February 1997, and complained that he was upset about the statements being made to him by supervisors, McCabe told him to leave. Although McCabe assured Berry that he was not fired, McCabe offered to pay for his truck-driving school. McCabe did not deny offering Berry tuition assistance, but he denied that it was conditioned on resignation. However, it is clear that once Berry became a truck driver he would no longer be working at the Bakery. I find that Respondent violated Section 8(a)(1) of the Act by offering Berry tuition assistance so that he would leave the Bakery. I credit Berry that in February 1997, Lewis told him that he did not like him because he was for the Union and that anyone who was for the Union did not belong there. I credit Berry that Lewis told him he was trying to break down the bakery and that the Union would destroy the Bakery. I find that these statements constituted a threat to discharge Berry because he supported the Union and “did not belong there.” Respondent thus violated Section 8(a)(1) of the Act by threatening Berry with discharge because he supported the Union. The General Counsel asserts that when Walls told Berry during the February 1997 argument that Lewis could say anything about

the Union but Berry could not, that Walls was establishing an overly broad ban on an employee’s right to discuss the Union. I do not agree. Walls’ statement was made in the context of an argument between Berry, Lewis, and Walls and it involved no specific direction to Berry to stop discussing the Union at the workplace. I credit Berry that in May 1997, Nash asked Berry what the employees were seeking in their contract demands. The General Counsel argues that this constitutes an unlawful interrogation. I do not agree. Berry was an open union supporter and Nash’s question was not accompanied by any threats or unlawful statements.

CONCLUSIONS OF LAW

1. By selecting Irene Williams for layoff because she supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

2. By discharging James Edmonson and Sabrina James because they supported the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By interrogating employees concerning their activities in support of the Union, Respondent violated Section 8(a)(1) of the Act.

4. By giving employees the impression that their union activities were under surveillance, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with unspecified reprisals and with discharge because they supported the Union, Respondent violated Section 8(a)(1) of the Act.

By offering employees tuition assistance because they supported the Union and to induce them to abandon their employment, Respondent violated Section 8(a)(1) of the Act.

The General Counsel has not proved that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged and laid off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge or layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Greyston Bakery, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Selecting employees for layoff or discharging employees because they support the Union.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Interrogating employees concerning their activities in support of the Union, giving employees the impression that their union activities are under surveillance, threatening employees with unspecified reprisals and with discharge because they support the Union and offering employees benefits to induce them to abandon their employment because they support the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Irene Williams, James Edmonson, and Sabrina James full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Irene Williams, James Edmonson, and Sabrina James whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Yonkers, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge, layoff or otherwise discriminate against any of you for supporting Local 3, Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT threaten you with reprisals and discharge because you support the Union.

WE WILL NOT offer you benefits to induce you to leave the bakery because you support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Irene Williams, James Edmonson, and Sabrina James full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Irene Williams, James Edmonson, and Sabrina James whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Irene Williams, James Edmonson, and Sabrina James, and WE WILL NOT, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

GREYSTON BAKERY, INC.

¹⁶ If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."